CIMB Bank Bhd v Foo Suit Ching & Anor

HIGH COURT (SEREMBAN) — ORIGINATING SUMMONS NO 24–566 OF 2009
AHMAD NASFY JC
3 FEBRUARY 2010

Land Law — Restraint on dealings — Caveat — Application for removal of — Whether plaintiff chargee was aggrieved person — Whether first defendant had caveatable interest — Whether there were serious issues to be tried — Whether there was inordinate delay by caveator in bringing action — Whether rights of plaintiff as chargee overrode rights of caveator — National Land Code ss 322(2) & 327

The first defendant had entered into a sale and purchase agreement ('SPA') to purchase certain lots of land situated in Seremban, Negeri Sembilan ('the lots of land') from a developer. However, the developer of the land had failed to give the first defendant vacant possession of the lots of land since 1999. The plaintiff is the chargee bank which obtained a valid order for the sale of the lots of land to secure its debts. The first defendant had entered caveats on the lots of land to prevent a sale of the lots of land to which it claimed a caveatable interest. The caveats were registered by the second defendant. By way of the present application the plaintiff challenged the entry of the caveats by the defendants and prayed for the removal of the caveats entered by the first defendant. The plaintiff contended that the caveat entered by the first defendant had violated the clear and express terms of Form 19B of the National Land Code ('the NLC') by not stating specifically the portion of land that was bound by the caveat or the particular interest that it sought to bind. The plaintiff further submitted that the first defendant had lost his rights by not promptly commencing an action against the developer for specific performance of the SPA. It was also the plaintiff's case that as a chargee it had an indefeasible right by virtue of the registration of the charge and that this right had priority over the caveat which was lodged after that. In response the first defendant challenged the validity of the order for sale obtained by the plaintiff in the presence of the caveats lodged by him. The first defendant submitted that having paid 10% of the purchase price for the lots of land he was a bona fide purchaser who was still capable and interested in executing the SPA he had entered into with the developer, and that he would incur loss which cannot be compensated if the caveated lots of land were sold. The first defendant further submitted that there was no defect in the Form 19B submitted by him and that a private caveat could be entered on the whole land even though the caveator had a partial interest in the land. The court had to decide whether the balance

of convenience required the caveat entered by the first defendant to be maintained or removed.

Held, allowing the plaintiff's application with costs:

(1) A challenge against the entry of a caveat or its removal may be made by a party 'aggrieved' by its entry under s 327 of the NLC. In the present case, although the plaintiff was not the proprietor of the lots of land it was well within s 327 of the NLC as an 'aggrieved person' (see paras 15 & 18).

(2) The information furnished by the first defendant under Form 19B had to be specific in nature but the caveator in the present case did not state that the caveat was intended to bind only his limited interest in the lots of land and not the whole land. This could be considered as one of the grounds for removal of the caveat entered by the caveator as the latter had violated the salient provisions of s 322(2) of the NLC (see paras 23–24).

(3) Looking at the factual matrix of the case it is difficult to envisage whether the first defendant would obtain vacant possession of the lots of land when the developer had failed to give him vacant possession of the same since 1999. Based on decided cases and the surrounding circumstances of this case, it was found that there were no serious issues to be tried. Further, there was also an inordinate delay on the part of the caveator in bringing an action in this case. The caveator's delay in proceeding to obtain specific performance of the SPA meant that the first defendant in this case was not entitled to maintain the caveat (see para 26).

(4) Upon considering the balance of convenience for both the parties it was found that the rights of the chargee bank overrode the rights of the caveator and that the chargee would not be denied from proceeding with the order for sale (see para 36)

[Bahasa Malaysia summary

Defendan pertama telah menandatangani perjanjian jual beli ('PJB') untuk membeli lot-lot tanah tertentu yang terletak di Seremban, Negeri Sembilan ('lot-lot tanah tersebut') daripada pemaju. Walau bagaimanapun, pemaju tanah tersebut gagal untuk memberi defendan pertama milikan kosong lot-lot tanah tersebut semenjak 1999. Plaintif adalah bank pemegang gadaian yang memperoleh perintah sah untuk jualan tanah-tanah tersebut untuk menjamin hutangnya. Defendan pertama memasukkan kaveat ke atas lot-lot tanah tersebut untuk menghalang jualan tanah-tanah tersebut yang mana ia menuntut kepentingan kaveat. Kaveat didaftarkan oleh defendan kedua. Melalui permohonan ini plaintif mencabar kemasukan kaveat oleh defendan-defendan dan memohon untuk pemotongan kaveat yang dimasukkan oleh defendan pertama. Plaintif berhujah bahawa kaveat yang dimasukkan oleh defendan pertama mencabuli terma-terma jelas dan nyata Borang 19B Kanun Tanah Negara ('KTN') dengan tidak menyatakan secara

spesifik bahagian tanah yang terikat dengan kaveat atau kepentingan tertentu yang ia pohon untuk mengikat. Plaintif selanjutnya berhujah bahawa defendan pertama telah kehilangan haknya apabila tidak dengan segera memulakan tindakan terhadap pemaju untuk pelaksanaan spesifik PJB. Ia juga adalah kes plaintif bahawa sebagai pemegang gadaian ia mempunyai hak tak boleh sangkal melalui pendaftaran caj dan bahawa hak ini mempunyai keutamaan terhadap kaveat yang mana dimasukkan selepasnya. Dalam menjawab defendan pertama mencabar kesahan perintah jualan yang diperolehi oleh plaintif di dalam kehadiran kaveat yang dimasukkannya. Defendan pertama berhujah setelah membayar 10% daripada harga belian untuk lot-lot tanah tersebut dia adalah pembeli bona fide yang masih berupaya dan berminat dalam melaksanakan PJB yang dimasukkan olehnya bersama pemaju, dan bahawa dia mengalami kerugian yang tidak dapat dibayar pampasan jika lot-lot yang dikaveatkan tersebut dijual. Defendan selanjutnya berhujah bahawa tidak terdapat kecacatan di dalam Borang 19B yang diserahkan olehnya dan bahawa kaveat persendirian boleh dimasukkan atas keseluruhan tanah walaupun pengkaveat mempunyai kepentingan yang tidak sepenuhnya di dalam tanah tersebut. Mahkamah terpaksa memutuskan sama ada imbangan kesenangan memerlukan kaveat tersebut dimasukkan oleh defendan pertama untuk dikekalkan atau dipotong.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Pencabaran terhadap kemasukan kaveat atau pemotongannya boleh dibuat oleh pihak yang 'aggrieved' terhadap kemasukannya di bawah s 327 KTN. Dalam kes ini, walaupun plaintif bukan pemilik lot-lot tanah tersebut ia adalah terangkum di dalam s 327 KTN sebagai 'aggrieved person' (lihat perenggan 15–18).

(2) Maklumat yang dikemukakan oleh defendan pertama di bawah Borang 19B patut bersifat spesifik tetapi pengkaveat di dalam kes ini tidak menyatakan bahawa kaveat telah diniatkan untuk mengikat hanya kepentingan terhadnya di dalam lot-lot tanah tersebut dan bukannya keseluruhan tanah tersebut. Ini boleh dipertimbangkan sebagai salah satu daripada alasan untuk pemotongan kaveat yang dimasuki oleh pengkaveat kerana pengkaveat telah mencabuli peruntukan penting s 322(2) KTN (lihat perenggan 23–24).

(3) Melihat pada matrik fakta kes ini ia adalah susah untuk membayangkan sama ada defendan pertama akan memperoleh milikan kosong lot-lot tanah tersebut apabila pemaju gagal untuk memberikan dia milikan kosong tanah tersebut semenjak 1999. Berdasarkan kes-kes yang diputuskan dan keadaan sekeliling kes ini, ia didapati bahawa tidak terdapat isu serius yang boleh dibicarakan. Selanjutnya, terdapat kelewatan terlampau oleh pengkaveat di dalam mengambil tindakan di dalam kes ini. Kelewatan pengkaveat di dalam meneruskan untuk

memperoleh pelaksanaan spesifik PJB bermaksud bahawa defendan pertama di dalam kes ini tidak berhak untuk mengekalkan kaveat tersebut (lihat perenggan 26).

(4) Dalam mempertimbangkan imbangan kesenangan untuk kedua-dua pihak, ia didapati bahawa hak-hak bank pemegang gadaian mengatasi hak-hak pengkaveat dan bahawa pemegang gadaian tidak boleh dinafikan daripada meneruskan dengan perintah jualan (lihat perenggan 36).]

Notes

For cases on caveats, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3611–3981.

Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan Bin Wan Majid & Anor, interveners) and another action 1996 3 MLJ 385, HC (refd)

Blossom Horizon Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor [2003] 6 MLJ 721; [2003] 7 CLJ 515, HC (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)

Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650, SC (refd)

Jasalam (M) Sdn Bhd v Wong Koon Yee [2000] 3 MLJ 115, CA (refd)

Jivanjit Kaur a/p Sohan Singh v Amar Singh a/l Sunder Singh [2000] 4 MLJ 55, HC (refd)

Kho Ah Soon v Ooi Kar Seng (Properties) [1995] 3 MLJ 293, CA (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Murugappa Chettiar Lakshamanan v Lee Teck Mook [1995] 1 MLJ 782, CA (refd)

Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463, CA (refd)

Trans-Summit Sdn Bhd v Chun Nyook Lin [1995] 3 MLJ 247; [1994] CLJ 445, CA (refd)

Legislation referred to

National Land Code ss 232(2), 323(2), 326, 327, 327(1), 328(1), Form 19B

Irwan Ismail (Albar & Partners) for the plaintiff and mentioning on behalf of the first defendant.

Hamizah (State Legal Advisor, Negeri Sembilan) for the second defendant.

Ahmad Nasfy JC:

[1] This is the plaintiff's application vide encl 1 praying for the removal of caveat's entered, by the first defendant on Grant No 51629, Lot No 17501 and Grant No 51614, Lot No 7502 ('the lots'), in the Town of Bukit Kepayang, district of Seremban, Negeri Sembilan. The relevant caveats were registered by the second defendant.

THE PLAINTIFF'S SUBMISSION

[2] It is the plaintiff's contention that the first defendants' act of entering the caveat had made them the aggrieved party by virtue of s 327(1) of the National Land Code.

[3] The plaintiff's counsel had highlighted that the defendant had violated the clear and express terms of Form 19B of the National Land Code. It is their contention that the caveator must clearly state the caveat is to bind the land itself or an undivided share in the land or a particular interest only.

[4] It is the plaintiff's contention that the caveat entered by the first defendant binds the certain portion of land purportedly bought by him and not the whole land itself as caveated by the first defendant.

[5] Apart from this the plaintiff had also highlighted to this honorable court that the first defendant should have commenced an action promptly if he considers himself entitled to specific performance of the sale and purchase agreement entered with the developer.

[6] The plaintiff is of the view that as a chargee they have an indefeasible right by virtue of the registration of the charge and this right had priority over the caveat which was lodged after that.

THE FIRST DEFENDANT'S SUBMISSION

[7] The first defendant argued that as a bona fide purchaser of the said lots he has a caveatable interest.

[8] It is also the first defendant's justification that since the developer failed to deliver vacant possession since 1999 there are issues to be tried. The first defendant also hereby challenges the validity at the order for sale obtained by the plaintiff in the presence of the caveats being lodged by the first defendant.

[9] The first defendant's counsel submitted that the balance of convenience is on their side as the first defendant is still capable and interested in executing the sale and purchase agreement entered with the developer. It is the first defendants' contention that if the caveated lots are sold they will incur immense lost which cannot be compensated.

[10] The first defendant had submitted that there is no defect in Form 19B and in support of this they have refered to the case of *Blossom Horizon Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor F* [2003] 6 MLJ 721; [2003] 7 CLJ 515 whereby it was decided that a private caveat can be entered on the whole land even though the caveator might have partial interest in the land.

THE SECOND DEFENDANT'S SUBMISSION

[11] It is the second defendant's contention that the caveat registered is proper in procedure and law.

[12] The second defendant's counsel, the learned state legal advisor, submitted that the registrar acted upon the powers conferred to him under s 328(1) of the National Land Code when he registered the caveat. The second defendant contends that since the powers of the registrar were duly exercised therefore he is not of duty to enquire into whether the application for the entry of the private caveat was validly made. Alas, the second defendant has highlighted to this honorable court that Form 19B was properly executed.

FINDINGS

[13] The very nature of a caveat can be defined in simple terms through the case of *Jivanjit Kaur a/p Sohan Singh v Amar Singh a/l Sunder Singh* [2000] 4 MLJ 55 whereby Justice Kamalanathan Ratnam said 'a caveat was maintained to preserve the 'status quo' until the disposal of the civil suit'. (Emphasis added.)

[14] Considering the very nature of a caveat, a challenge can be made against the entry of a caveat by a party whose land or interest therein is affected by the caveat and who applies to the registrar for its removal (see s 326 of the National Land Code).

[15] A challenge may also be made by application to the court for its removal by a party 'aggrieved' by its entry under s 327 of the National Land Code.

[16] In order to bring an action under the ambit of s 327 of the National Land Code the applicant must satisfy that they are indeed aggrieved by the entry of the caveat.

[17] In the case *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247; [1994] CLJ 445 the court made a ruling in relation to applications under s 327 of the National Land Code where the applicant for removal is not the proprietor. Justice Mohd Noor said:

> It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established make him aggrieved by the existence of the caveat.

[18] Having said of the above, I hereby state with full agreement as to the plaintiff's counsel submission that they are well within the threshold of s 327 of the National Land Code to constitute the proceedings as an 'aggrieved person' even though they are not the proprietors of the said lots.

[19] The second issue I had to consider is whether the first defendant had a caveatable interest.

[20] In the case of *Eng Mee Yong & Ors v Letchumanan* 1979 2 MLJ 212 it was decided that the caveator in an application to oppose the removal of caveat:

> ... must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action by preventing the (registered proprietor) from disposing of his land to some third party.

[21] The abovementioned test was adopted and followed in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (CA) and *Murugappa Chettiar Lakshamanan v Lee Teck Mook* [1995] 1 MLJ 782.

[22] The salient provisions of s 232(2) of the National Land Code is clear whereby:

> Any such person or body wishing to apply for the entry of such caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or an undivided share in the land or a particular interest only

[23] The information furnished under Form 19B has to be specific in nature. The caveator here had failed to comply with the requirement of s 323(2) of the National Land Code as he specifically did not state that the caveat was intended to bind only his limited interest in the said lots and not the whole land.

[24] It is in my opinion that this can be considered as one of the grounds for removal of the caveat entered by the caveator as the latter had violated the salient provisions of s 322(2) of the National Land Code.

[25] The third issue before me is whether there are serious issues to be tried. The caveator had argued that he was as a bona fide purchaser and having paid 10% of the purchase price he is still able and willing to execute the contract of sale.

[26] Be that as it may, looking at the factual matrix of this case I fail to see how the purported sale and purchase agreement between the caveator and the developer can be concluded especially when learned counsel for the first defendant had mentioned in their submissions that the vacant possession of the said lots are yet to be given since year 1999 and the developer failed to give a valid explanation for the delay.

[27] In the case of *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan Bin Wan Majid & Anor, interveners) and another action* [1996] 3 MLJ 385. The trial judge said there were serious triable issues as to the existence of a purported concluded agreement but he allowed the removal of the caveat. *The learned judge remarked that there was no evidence that the proprietor was going to sell the land to third parties and it seemed that the caveator would have had difficulties in meeting the purchase price under the purported contract.* (Emphasis added.)

[28] In the case of *Kho Ah Soon v Ooi Kar Seng (Properties)* [1995] 3 MLJ 293 (CA) the proprietor agreed to sell part of the land to the caveator. There was a dispute about the date of the agreement and the proprietor advised the caveator he would not proceed. *The caveator paid 10% as deposit to his solicitor for transmission to the vendor's solicitors. The purchaser then sought specific performance on the basis of a concluded contract even though it had not been formally executed. He also sought an extension of the caveat and an injunction. The High Court allowed for the removal of caveat.* (Emphasis added.)

[29] Having said of the above, and considering the surrounding circumstance of this case I fail to see the existence of any serious issues to be tried.

[30] There was also was also inordinate delay on the part of the caveator in bringing an action in this case. The first defendant's counsel did mention in their submission as to an action for specific performance brought by the caveator against the developer. It is my stand that, assuming that the caveator had not been given vacant possession since 1999 then he should have done something to assert his rights.

[31] In the case of *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463, the issue was there was no action pending a fact, which the court did not inquire into on appeal Justice Sri Ram highlighted that though there was a caveatable interest and there were serious issues to be tried but the balance of convenience did not require the preservation of the caveat because the caveator had not commenced an action, timeously at all. The Court of Appeal stressed on the importance of timeous institution and persecution of proceeding to confirm the caveators rights.

[32] In the case of *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115 (CA), it was decided that a caveator lost his right to maintain his caveat against the purchasers of the land when the caveator 'slept upon his rights'. Accordingly in this case, the caveators delay in proceeding to specific performance of the purported agreement meant that he was not entitled to maintain the caveat.

[33] The court at the end of the day must decide whether the balance did require the caveat to be maintained or removed.

[34] The plaintiff is a chargee bank intending to assert their rights as a chargee to secure the debt. The first defendant where else is the party who intends to assert his rights over the lots caveated as he had paid the earnest sum and was not given the vacant possession on time.

[35] The chargee bank obtained a valid order for sale to secure their debts. The first defendant cannot just come to this honorable court and allege that they are raising an objection or protest to it. Whatever protest or objection should be by way of cause to the contrary which I suppose was not made in this case on time during the hearing of the foreclosure proceedings.

[36] As a conclusion, after considering the balance of convenience for both the parties, I find that the rights of the chargee bank overrides the rights of the caveator. This honorable court will not deny the chargee from enjoying the fruits of his judgment.

[37] In the case of *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 it was decided that the interest behind the caveat, whatever it may have been was however, subject to the registered charge. It was decided in this case that any dealing subsequent to the charge and with notice of the charge, cannot defeat the indefeasible interest of the registered charge and through him, the purchaser of a judicial sale. The interest of a registered chargee is not merely that the land is to be used as security for the loan, but that all the remedies of the chargee, including on default the sale of the land, are implied when the registration occurs.

[38] Therefore, for the reasons adumbrated above, I allow the plaintiff's application with costs.

Plaintiff's application allowed with costs.

Reported by Kohila Nesan